

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SPENCER D. LEE

Claimant

V.

LEE CONSTRUCTION COMPANY, LLC

Respondent

AND

**KANSAS BUILDING INDUSTRY WORK
COMP FUND**

Insurance Carrier

Docket No. 1,071,817

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 23, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Roy T. Artman of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant was a member of respondent's limited liability company (LLC) and not an employee at the time of his September 25, 2014, accident. The ALJ determined claimant was not covered by respondent's workers compensation policy on the date of accident and denied compensability.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 15, 2015, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues he was not a member of respondent's LLC when he was injured. Claimant argues the membership of the LLC was given to him as a gift without his knowledge and without his acceptance of the membership, such that he was not a member of the LLC.

Respondent maintains the uncontroverted evidence, including records of the Kansas Secretary of State, are clear regarding claimant's status as an LLC member on the date of his accident. Respondent argues the ALJ's Order should be affirmed.

The sole issue for the Board's review is: was claimant an employee of respondent on September 25, 2014?

FINDINGS OF FACT

Respondent, a construction business, became an LLC on February 20, 2009. Doug Lee, respondent's owner and claimant's father, testified he hired an accountant to assist in preparing and filing respondent's Articles of Organization with the Kansas Secretary of State. Mr. Lee indicated the documentation was not reviewed by an attorney.

Mr. Lee stated there were no changes to the corporate structure of respondent from February 2009 through the beginning of calendar year 2014. Mr. Lee indicated respondent employed five people in the summer of 2014, including his two sons: claimant and Scott Lee.

On August 5, 2014, Doug Lee submitted Form CL 53-14¹ to the Kansas Secretary of State, which added his sons as members of the LLC. Mr. Lee's form, file-stamped August 11, 2014, indicated the amendment would be effective upon filing. Mr. Lee stated he included the requisite \$35 filing fee with his submission.

Mr. Lee stated he considered his sons to be employees up until August 2014. Insurance premiums were paid on his sons' behalf, and Mr. Lee also reported their wages as he would any other employee. He did not notify the carrier that his sons were no longer employees on the payroll, and he did not change anything regarding the wages reported. Mr. Lee testified he did not inform the insurance carrier of the change in any respect. Mr. Lee continued to pay insurance premiums through January 2015.

After he filed the August 2014 form containing the changes, Mr. Lee's accountant informed him any changes to the corporate structure in terms of membership should have been effective January 1, 2015, for tax purposes. Mr. Lee modified the effective date of the new changes on the same form previously filed with the Secretary State on August 11, 2014. Mr. Lee handwrote the new effective date, changed the signature date and submitted the form and filing fee to the Secretary of State on September 24, 2014.²

The following day, September 25, 2014, claimant sustained an injury while on the job site. Claimant fell through a floor joist and landed on his head in the basement below, suffering a fracture to his skull. Claimant testified he has total loss of hearing on the right side and no sense of taste or smell. Claimant stated he has treated with various doctors,

¹ Kansas Secretary of State Limited Liability Company Certificate of Amendment.

² See P.H. Trans., Cl. Ex. 3.

and as far as he understands, the taste and smell loss is permanent. Claimant testified one doctor has suggested a surgical procedure to help with his hearing and balance.

In a letter dated September 29, 2014, the Secretary of State returned Mr. Lee's amended form and enclosed filing fee. The letter indicated Mr. Lee's form was not accepted for the following reason:

We cannot accept the file stamped document again and file as a new amendment. If amending you will need to complete a new form CL limited liability company certificate of amendment. You will want to keep this document for your records which was filed 8/11/2014.

Return a new completed form CL along with check #4575 for \$35. On item #3 on the document you will want to state what you are amending which would be the future effective date for the amendment that was filed in our office on 8/11/2014.³

Accordingly, Mr. Lee completed a new CL 53-14 in compliance with these instructions and correctly filed the changes with the Secretary of State. The form was filed and stamped by the State on October 15, 2014.⁴

Mr. Lee testified:

Q. Okay. As of the – well, the day before [claimant's] accident, did you intend him to be an employee or a member of your corporation?

A. He was an employee.⁵

Claimant stated he was unaware of any changes made to respondent's corporate structure prior to the accident, including his member status. Claimant testified:

Q. All right. Just out of curiosity, did you know that your dad was attempting to make any of these changes?

A. No.⁶

³ P.H. Trans., Cl. Ex. 4.

⁴ See P.H. Trans., Resp. Ex. 2.

⁵ P.H. Trans. at 14.

⁶ *Id.* at 18.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-508(b) states:

“Workman” or “employee” or “worker” means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include, but not be limited to: Executive officers of corporations; professional athletes; persons serving on a volunteer basis as duly authorized law enforcement officers, attendants, as defined in subsection (f) of K.S.A. 65-6112, and amendments thereto, drivers of ambulances as defined in subsection (d) of K.S.A. 65-6112, and amendments thereto, firefighters, but only to the extent and during such periods as they are so serving in such capacities; persons employed by educational, religious and charitable organizations, but only to the extent and during the periods that they are paid wages by such organizations; persons in the service of the state, or any department, agency or authority of the state, any city, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof, under any contract of service, express or implied, and every official or officer thereof, whether elected or appointed, while performing official duties; persons in the service of the state as volunteer members of the Kansas department of civil air patrol, but only to the extent and during such periods as they are officially engaged in the performance of functions specified in K.S.A. 48-3302, and amendments thereto; volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; minors, whether such minors are legally or illegally employed; and persons performing community service work, but only to the extent and during such periods as they are performing community service work and if an election has been filed an election to extend coverage to such persons. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator. **Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self-employed persons.** (emphasis added)

K.S.A. 2013 Supp. 44-542a states:

Each individual employer, partner, limited liability company member or self-employed person may elect to bring such employers within the provisions of the workers compensation act, by securing and keeping insured such liability in accordance with clause (1) of subsection (b) of K.S.A. 44-532, and amendments thereto. **Such insurance coverage shall clearly indicate the intention of the parties to provide coverage** for such employer, partner, limited liability company member or self-employed person. When such election is made, **the insurance carrier or its agent shall cause to be filed with the director a written statement of election** to accept thereunder so that such employer, partner, limited liability company member or self-employed person is treated as an employee for the purposes of the workers compensation act pursuant to such election. This election

shall be effective until such time as such employer, partner, limited liability company member or self-employed person ceases to be insured in accordance with clause (1) of subsection (b) of K.S.A. 44-532, and amendments thereto, whereupon a written statement withdrawing such election shall be filed with the director. (emphasis added)

K.S.A. 2014 Supp. 17-7663(j) defines a member of an LLC as:

“Member” means a person who is admitted to a limited liability company as a member as provided in K.S.A. 17-7686, and amendments thereto, or, in the case of a foreign limited liability company, in accordance with the laws of the state or foreign country or other foreign jurisdiction under which the foreign limited liability company is formed.

K.S.A. 2014 Supp. 17-7686, relating to the admission of members to an LLC, states:

(a) In connection with the formation of a limited liability company, a person is admitted as a member of the limited liability company upon the later to occur of:

(1) The formation of the limited liability company; or

(2) the time provided in and upon compliance with the operating agreement or, if the operating agreement does not so provide, when the person's admission is reflected in the records of the limited liability company.

(b) After the formation of a limited liability company, a person is admitted as a member of the limited liability company:

(1) In the case of a person who is not an assignee of a limited liability company interest, including a person acquiring a limited liability company interest directly from the limited liability company and **a person to be admitted as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company** at the time provided in and **upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the consent of all members** and when the person's admission is reflected in the records of the limited liability company;

(2) in the case of an assignee of a limited liability company interest, as provided in subsection (a) of K.S.A. 17-76,114, and amendments thereto, and at the time provided in and upon compliance with the operating agreement or, if the operating agreement does not so provide, when any such person's permitted admission is reflected in the records of the limited liability company; or

(3) unless otherwise provided in an agreement of merger or consolidation, in the case of a person acquiring a limited liability company interest in a surviving or resulting limited liability company pursuant to a merger or consolidation approved in accordance with subsection (a) of K.S.A. 17-7681, and amendments thereto, at the time provided in and upon compliance with the operating agreement of the

surviving or resulting limited liability company; and in the case of a person being admitted as a member of a limited liability company pursuant to a merger or consolidation in which such limited liability company is not the surviving or resulting limited liability company in the merger or consolidation, as provided in the operating agreement of such limited liability company.

(c) A person may be admitted to a limited liability company as a member of the limited liability company and may receive a limited liability company interest in the limited liability company without making a contribution or being obligated to make a contribution to the limited liability company. Unless otherwise provided in an operating agreement, a person may be admitted to a limited liability company as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company. Unless otherwise provided in an operating agreement, a person may be admitted as the sole member of a limited liability company without making a contribution or being obligated to make a contribution to the limited liability company or without acquiring a limited liability company interest in the limited liability company.

(d) Unless otherwise provided in an operating agreement or another agreement, a member shall have no preemptive right to subscribe to any additional issue of limited liability company interests or another interest in a limited liability company.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.

ANALYSIS

The ALJ found claimant was a member of respondent's LLC at the time of his accident. The undersigned disagrees. The uncontroverted evidence is claimant did not know he had been made a member of the LLC. Claimant comes within the provisions of K.S.A. 2014 Supp. 17-7686(b)(1) as a person admitted as a member of the limited liability company without acquiring a limited liability company interest. K.S.A. 2014 Supp. 17-7686(b)(1) requires the consent of all the members of the LLC for the new membership to become effective.

While the statute is not clear as to whether the new member is included in the provision of consent of all members, it seems incongruous that a person could either benefit from or become liable as a member of an LLC without such person's consent. The undersigned finds claimant is one of the members required to consent to his own

⁷ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

membership in the LLC. As claimant was not given the opportunity to consent to his involvement in the LLC, his membership was not complete on September 25, 2014.

CONCLUSION

On September 25, 2014, claimant was not a member of the respondent's LLC. Claimant is an employee for respondent pursuant to K.S.A. 2013 Supp. 44-508(b).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated January 23, 2015, is reversed. The case is remanded to the ALJ for a determination of compensation due to claimant.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
larry@ksworkcomplaw.com
fdesk@ksworkcomplaw.com

Roy T. Artman, Attorney for Respondent and its Insurance Carrier
roy@kbiwcf.com

Thomas Klein, Administrative Law Judge